

FEDERAL COURT OF AUSTRALIA

DXG17 v Minister for Immigration, Citizenship and Multicultural Affairs

[2024] FCAFC 41

Appeal from: DXG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FedCFamC2G 175

File number(s): VID 221 of 2023

Judgment of: **BEACH, WHEELAHAN AND O'BRYAN JJ**

Date of judgment: 21 March 2024

Catchwords: **MIGRATION** – appeal from decision of Federal Circuit and Family Court of Australia (Division 2) (**Federal Circuit Court**) – where delegate of first respondent refused to grant appellants protection visas under s 65 of *Migration Act 1958 (Cth)* (**Act**) – where Immigration Assessment Authority (**Authority**) affirmed delegate's decision under s 473CC of the Act – where Federal Circuit Court dismissed application for judicial review of Authority's decision – grounds of appeal concern failure by first appellant to produce documentary evidence in response to request by Minister under s 91W of the Act – no jurisdictional error by Authority identified – no error by primary judge identified – appeal dismissed

Legislation: *Constitution* s 75
Migration Act 1958 (Cth) ss 5AAA, 36, 65, 91W, 473CC, 473DB, 473DC, 476
Migration Amendment (Protection and other Measures) Act 2015 (Cth)

Cases cited: *AIB16 v Minister for Immigration* (2017) 254 FCR 457
BGM16 v Minister for Immigration and Border Protection (2017) 252 FCR 97
BVD17 v Minister for Immigration and Border Protection (2019) 268 CLR 29
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
CPQ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 191
DCP16 v Minister for Immigration and Border Protection [2019] FCAFC 91

Minister for Home Affairs v DUA16 (2020) 271 CLR 550
Minister for Immigration and Citizenship v SZMDS (2010)
240 CLR 611
*NAHI v Minister for Immigration and Multicultural and
Indigenous Affairs* [2004] FCAFC 10
Plaintiff S157/2002 v Commonwealth of Australia (2003)
211 CLR 476
*SZBEL v Minister for Immigration and Multicultural and
Indigenous Affairs* (2006) 22 CLR 152

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	64
Date of hearing:	23 November 2023
Counsel for the Appellants	M Guo
Solicitor for the Appellants	Victoria Legal Aid
Counsel for the First Respondent:	R Knowles KC with C Hibbard
Solicitor for the First Respondent:	Clayton Utz

ORDERS

VID 221 of 2023

BETWEEN: **DXG17**
First Appellant

DXH17
Second Appellant

DXJ17 BY HIS LITIGATION GUARDIAN DXG17 (and others
named in the Schedule)
Third Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

ORDER MADE BY: BEACH, WHEELAHAN AND O'BRYAN JJ

DATE OF ORDER: 21 MARCH 2024

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellants pay the costs of the First Respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

- 1 The appellants are a husband, wife and their three children. The youngest child was born in Australia on 25 June 2014. The other appellants arrived in Australia by boat on 1 September 2012.
- 2 On 9 September 2015, the appellants lodged combined applications for temporary protection visas. Only the first appellant (the husband) put forward claims to protection; the other appellants (his wife and children) relied on membership of his family unit. The first appellant claimed that he faced persecution in Iran as a stateless Faili Kurd.
- 3 On 9 March 2017, a delegate of the Minister for Immigration and Border Protection made a decision under s 65 of the *Migration Act 1958* (Cth) (**Act**) refusing to grant the appellants protection visas. On 11 August 2017, the Immigration Assessment Authority affirmed that decision under s 473CC of the Act within Part 7AA. The appellants brought an application for judicial review of the Authority's decision in the Federal Circuit Court of Australia, which subsequently became the Federal Circuit and Family Court of Australia (Division 2), under s 476 of the Act. On 8 March 2023, the Federal Circuit Court dismissed that application. This is an appeal from that decision.
- 4 The Notice of Appeal raises the following grounds of appeal:
 1. The primary judge erred in failing to find that the IAA unreasonably failed to exercise the power in s 473DC of the Act to get new information from the Appellants in respect of how the First and Second Appellants would have responded to a hypothetical allegation of adultery, which was raised for the first time by the IAA.
 2. The primary judge erred in failing to find that the IAA found that hospital cards in respect of the Third and Fourth Appellants were the 'only official record' of their birth, such finding not being open on the evidence.
 3. The primary judge erred in:
 - a. construing s 91W(3) as not being engaged if the Minister makes a request under s 91W(1) for a category of documents and the applicant does not have a reasonable explanation for failing to provide one document in that category but does have a reasonable explanation for failing to provide another document in that category;
 - b. failing to find that the IAA failed to consider the First Appellant's

claim in his statutory declaration of 3 November 2016 to have unsuccessfully attempted to obtain Iranian documentation in respect of his identity, such claim capable of satisfying s 91W(3)(a) and (b) (ii) on their proper construction.

5 The grounds of appeal are materially the same as the grounds of review raised before the Federal Circuit Court. While ground 3(a) did not form an express ground of review below, it was raised in the course of supplementary submissions received by the primary judge after the hearing, and was determined by the primary judge.

6 Each of the grounds of appeal concern the failure by the first appellant to produce documentary evidence of his identity, nationality or citizenship in response to a request made by the Minister under s 91W(1) of the Act. In broad terms, s 91W(2) stipulates that the Minister must refuse to grant a protection visa if an applicant fails to comply with a request under s 91W(1) without a reasonable explanation. The Authority was not satisfied that the first appellant had been truthful about what documentation he possessed in Iran about his identity, nationality or citizenship or why he had been unable to provide such documentation. In those circumstances, the Authority was not satisfied that the first appellant had provided a reasonable explanation for failing to provide the documentary evidence of his identity, nationality or citizenship requested pursuant to s 91W(1) and concluded that s 91W prevented the grant of the protection visa to the first appellant. It followed that the applications by the first appellant's wife and three children were also refused.

7 The issues raised by the grounds of appeal make it necessary to refer to the request made by the Minister under s 91W(1) of the Act, the first appellant's responses to that request and aspects of the decision-making process before the Minister's delegate as well as before the Authority. It is convenient to commence with an overview of s 91W and some established principles that are uncontroversial.

Sections 5AAA and 91W of the Act

8 The *Migration Amendment (Protection and other Measures) Act 2015* (Cth) inserted a new s 5AAA into the Act and amended s 91W.

9 Section 5AAA provides as follows:

5AAA Non-citizen's responsibility in relation to protection claims

- (1) This section applies in relation to a non-citizen who claims to be a person in respect of whom Australia has protection obligations (however arising).

- (2) For the purposes of this Act, it is the responsibility of the non-citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim.
- (3) The purposes of this Act include:
 - (a) the purposes of a regulation or other instrument under this Act; and
 - (b) the purposes of any administrative process that occurs in relation to:
 - (i) this Act; or
 - (ii) a regulation or instrument under this Act.
- (4) To remove doubt, the Minister does not have any responsibility or obligation to:
 - (a) specify, or assist in specifying, any particulars of the non-citizen's claim; or
 - (b) establish, or assist in establishing, the claim.

10 Section 91W provides as follows:

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to produce such evidence.

- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

11 The Explanatory Memorandum to the Migration Amendment (Protection and other Measures) Bill 2014 (Cth) stated that those amendments were to:

make clear that it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim

and to:

create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so, including when an applicant provides bogus documents to establish their identity or either destroys or discards such evidence, or has caused that evidence to be destroyed or discarded.

12 The Explanatory Memorandum continued:

Schedule 1 of the Bill contains amendments which contribute to the integrity and improve the efficiency of the onshore protection status determination process. The measures clarify the responsibility of asylum seekers and encourage complete information to be provided upfront. The measures apply to all asylum seekers regardless of their mode of arrival.

New section 5AAA makes clear that for the purposes of the Migration Act, it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations (however arising) and to provide sufficient evidence to establish that claim. ...

...

Amended section 91W and new section 91WA relate to the provision of documentary evidence of identity, nationality or citizenship for the purposes of a protection visa application and are integrity measures. Establishing an asylum seeker's identity is a critical factor in determining whether a non-citizen engages Australia's protection obligations. The amendments establish grounds to refuse the grant of a protection visa to a protection visa applicant who:

- refuses or fails to provide evidence of identity, nationality or citizenship when requested to do so;
- provides a bogus document in response to such a request or provides bogus documents for the purposes of their application; or
- destroys or disposes of documentary evidence of identity, nationality, or citizenship, or causes such evidence to be destroyed or disposed of.

The refusal power will not apply if the applicant has a reasonable explanation and either produces documentary evidence of their identity, nationality or citizenship or has taken reasonable steps to provide such evidence. ...

- 13 The Minister's power to grant visas, including protection visas, under the Act is contained in s 65, which interacts with s 91W. Relevantly, s 65(1) provides as follows:

Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:

- (a) if satisfied that:
 - (i) the health criteria for it (if any) have been satisfied; and
 - (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
 - (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
 - (iv) any amount of visa application charge payable in relation to the application has been paid;is to grant the visa; or
- (b) if not so satisfied, is to refuse to grant the visa.

- 14 The purpose of the foregoing provisions was explained by Mortimer and Wigney JJ (Siopis J agreeing) in *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97 at [62]-[63]:

- 62 Essential to regulating the coming into and presence in Australia of non-citizens is to understand who they are, and where they have come from. The role of false documentation in the movement of people around the world is a notorious fact. It is unsurprising the legislature has seen fit to deal with the provision of false or inaccurate documentation in express terms in many places, and in many ways, in the *Migration Act* as an essential part of securing the objective in s 4(1).
- 63 More particularly, an individual's identity, nationality and citizenship are critical in the assessment of a protection visa application. This information goes to the fundamentals of the decision-making process, such as the country of nationality against which a person's claims are to be assessed. This information will often go to the core of an applicant's claims, because who a person is and where she or he comes from are integral aspects of why she or he claims to have a well-founded fear of persecution, or to fear significant harm for the purposes of complementary protection. Finally, whether an individual's claims are accepted as credible will often depend on the decision-maker being satisfied of a person's true identity.

- 15 The following aspects of the foregoing provisions, which were uncontroversial between the parties, can be noted.

- 16 First, by s 91W(1), the Minister or an officer is empowered to request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship. It was common ground that it is permissible for the Minister to make a generic request of an applicant seeking production of any documentary evidence of the applicant's identity, nationality or citizenship. That occurred in the present case.
- 17 Second, s 91W(2) requires the Minister to refuse to grant the protection visa to the applicant if four conditions are satisfied: the applicant has been given a request under subsection (1); the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and, when the request was made, the applicant was given a warning that the Minister cannot grant the protection visa to the applicant if the applicant refuses or fails to comply with the request or produces a bogus document in response to the request. It was common ground that the question whether the applicant has a reasonable explanation for refusing or failing to comply with the request is a matter for the Minister to determine. That conclusion follows from the interrelationship between s 65(1) and s 91W(2). By s 65(1), the Minister may only grant a protection visa if the Minister is satisfied that the grant of the visa is not prevented by s 91W. The conclusion is consistent with the approach taken by the Full Court in *AIB16 v Minister for Immigration* (2017) 254 FCR 457 at [89]-[91] (Tracey, Mortimer and Moshinsky JJ).
- 18 Third, s 91W(3) stipulates that s 91W(2) will not apply if two conditions are fulfilled. Those conditions are: first, that the Minister is satisfied that the applicant has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and second, that the applicant either produces documentary evidence of his or her identity, nationality or citizenship or has taken reasonable steps to produce such evidence. It can be observed that there is a logical discord between ss 91W(2) and (3). If the first condition in s 91W(3)(a) is fulfilled and so the Minister is satisfied that the applicant has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document, the third condition in s 91W(2)(c) will not be fulfilled. It follows that s 91W(2) will be inapplicable, regardless of whether the second condition in s 91W(3)(b) is fulfilled. That logical discord appears to render s 91W(3) otiose.

19 Fourth, the phrase “reasonable explanation” connotes not only that the explanation is rational, but also that the explanation is credible. To illustrate, an applicant may explain that they are unable to produce a document evidencing their identity because the document has been lost or taken from the applicant. That is a rational explanation for the failure to produce the document. However, if there is sufficient reason to doubt the credibility of the explanation, the explanation will not be reasonable. This is the meaning given to the phrase by the Full Court in *AIB16*, in the context of the production of bogus documents by the applicant, with which we respectfully agree:

91 Without wishing to state the obvious, the provision requires there to be an explanation for the provision of a bogus document: that is, the narrative told must explain, and connect to, the provision of the bogus document. Second, the delegate must be satisfied the explanation is “reasonable”. The word reasonable connotes an explanation that is not fanciful, that is believable in the circumstances and which has sufficient rational connection to how and why the bogus document was provided. Reasonable minds between delegates may differ on this: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] per Crennan and Bell JJ.

92 It is also obvious that for an explanation to be reasonable, it must first be accepted as genuine. Not all genuine explanations will be reasonable, but all reasonable explanations will be genuine.

93 We accept the Minister’s submissions about the delegate’s reasoning. In the appellant’s explanation, which he volunteered, there was a common substratum of facts between his claim to fear persecution and his explanation for the provision of a bogus document. In order for the delegate to determine whether he was satisfied the appellant had given a reasonable explanation about the bogus document, it was open to the delegate to examine and assess the appellant’s claims to protection. Had the appellant’s narrative about what happened to him in Iran been accepted, it is likely the delegate would have found there was a reasonable explanation for the purposes of s 91W. However, if the delegate found the appellant’s protection claims not to be credible, it was almost inevitable the appellant’s explanation would not be accepted as reasonable. The structure of the delegate’s reasoning reflects an approach that was plainly open to him.

20 The foregoing observations of the Full Court in *AIB16* have particular application in the present case.

The Minister’s request under s 91W

21 The first to fourth appellants arrived in Australia by boat on 1 September 2012. The fifth appellant was born in Australia on 25 June 2014. The department invited the appellants to apply for a temporary protection visa on 16 July 2015. The appellants lodged an application on 4 September 2015.

22 On 22 December 2015, the Department wrote to the first appellant acknowledging receipt of his application for a temporary protection visa. The Department's letter also requested the first appellant to provide additional information and documents. The relevant part of the request was as follows:

Providing documentary evidence of your identity, nationality or citizenship

You are requested to produce documentary evidence of your identity, nationality or citizenship for inspection by an officer of the department. This request is made under subsection 91W(1) of the Migration Act 1958 (the Act).

If you:

- refuse or fail to comply with this request under subsection 91 W(1) or if you produce a bogus document in response to this request; and
- the Minister is not satisfied that you have a reasonable explanation for refusing or failing to comply with the request, or for producing a bogus document

then under subsection 91W(2) of the Act the Minister must refuse to grant you a protection visa.

...

You must provide a reasonable explanation if you do not provide documentary evidence in response to this request. If an officer of the department is satisfied as to the explanation provided, you must either provide the documentary evidence or demonstrate that you have taken reasonable steps to provide documentary evidence. If you do not comply with these steps, the Minister must refuse to grant you a protection visa.

23 The first appellant replied on 20 January 2016 and provided a statutory declaration explaining why he was unable to provide the requested identity documents. The statutory declaration contained the following statements:

2. I was born in Khanakeen in Dialla, Iraq.
3. When I was a 1 year old, my parents and I fled from Iraq to Iran. We had to flee because at the time when Saddam Hussein was in power in Iraq, a lot of Kurdish Failis were expelled from Iraq.
4. I do not have my birth certificate from Iraq because I was a Kurd and we were all being kicked out of Iraq. I do not know if my parents tried to get my birth certificate. My father died when I was young so I could not ever ask him. My parents did not have any identity documents either. If they did, they could have stayed in Iraq.
5. When we moved to Iran my father applied for an identity card, and my father was given a "green card" that was issued for Faili Kurds only. It contained name, birth date, and citizenship, listed as Iraqi, because he was born in Iraq. You couldn't use it to buy a car or rent property. 28-29 years ago when my father passed away, the card was taken. I don't know why, but maybe because they needed identification for his burial. In 2001 the government collected all

of the green cards, and they were supposed to give a white card. But my family was never issued a white card. I do not know if my mother ever had a card.

6. My wife's father was also a Faili Kurd, and so she was never issued a card I also never had a card. Some relatives tried to get identity documents for 30-35 years. They even tried to go to small villages to find old relatives to find some identity documents but it never worked. There were people that were prepared to accept bribes in order to give identity documents, but I never tried.
7. I know so many of my close relatives tried to get identification, but they were not successful. So they had to leave, some of them to Europe to seek asylum. Even for their ancestors, nothing had been issued, so they did not have any documentation to show family history. They went to the registry and there was no record of their ancestors because they couldn't find anything in the registry. That is why the government would not issue any type of identification. I know I would have the same difficulties if I went to the registry and tried to find records of my ancestors.
8. In order to leave Iran, I paid a bribe to get a fake passport. I knew I could not apply for an Iranian passport because I have no identity documents. You need a birth certificate to get a passport and I do not have one. When I paid for the passport the smuggler asked me for my details - name, surname. But when I was given the passport, I did not look at the name on the passport so I do not know if the name was actually mine. It did have my photo on it. This passport was taken by the smuggler a couple of hours before I got on the boat to Australia.

24 On 18 October 2016, the Department invited the first appellant to attend an interview to discuss his application. Prior to the interview, the first appellant provided a supplementary statutory declaration dated 3 November 2016 to the Department. The stated purpose of the declaration was to clarify and add to previous statements made by the first appellant. In the declaration, the first appellant reiterated that neither he nor his wife had a green card or a white card. The first appellant also described his unsuccessful attempt in 2005 to obtain some form of identity document from the "registry of deaths and marriage" in Iran, and stated that he also tried to obtain a white card around that time but was refused because he did not have any identification documents and did not hold a green card.

25 The interview was conducted on 9 November 2016. At the interview, the first appellant was asked about various forms of identity documentation. Relevantly, the first appellant was asked about his marriage and the birth of his children and any documentation relating to those events. The following is an extract of the interview:

Q192. Tell me about how you met your wife.

A When we were living in Tehran, in Dolat Abad in Tehran I had a friend, he was telling me that he knows another Faili Kurd family; that they have a daughter and she is a very nice lady and if you want to get to know each other, they are very good family.

- Q193. Yes, okay. How old were you when you met?
- A When we married I was about 27, 28 years old.
- Q194. But when did you meet? How old were you when you met?
- A The same, 27, 28.
- Q195. Okay. And where were you married?
- A It was at my wife's place. At their place - the clergy person came and just called us husband and wife and we had a celebration there as well.
- Q196. And you weren't issued a marriage certificate?
- A No. No.
- Q197. So how do you prove that you are married?
- A It was just on a piece of paper. It was written my name and my details and her details that she has - we are going to be - we are married and then the - there were a few old men in the ceremony. They were the witness. They witnessed it and that was it.
- Q198. So that piece of paper - why do they write it on a piece of paper?
- A Because we didn't have any sort of - we didn't have access to do any sort of formal documents. It was just like a (indistinct) that they could witness. Just as anyone could do that.
- Q199. And who else signed the piece of paper?
- A There were a few old men that they knew us. Three or four of them. They just with their fingerprint and - that's yes, they were - they witnessed our marriage.
- Q200. And what sort of clergyman did you have to get who could conduct a Faili Kurd wedding ceremony? Was it a special type of clergyman?
- A It was someone who was helping basically the Faili Kurds and the Faili Kurds knew this person. If it was a wedding thing or even a death was happening, he could come and call people husband and wife, and sort of helping them.
- Q201. And was this a Persian man?
- A He was a Kurd.
- Q202. Okay. And you don't have - do you have the piece of paper?
- A Unfortunately it just got damaged and destroyed eventually, because it was just a normal piece of paper.
- Q203. What about your children's birth certificates?
- A We didn't have anything.
- Q204. But when they were born, didn't the hospital issue a piece of paper?
- A No. We didn't receive any certificate. Just a issued a card and on the card it just mentioning the weight and the - how is the hearing of the baby.

Q205. So there was a card.

A Yes, a card and on the card was mentioning what is the weight of the child, the baby and how is the hearing.

Q206. And health, did you say? Weight?

INTERPRETER: Hearing and weight.

MS LISTER:

Q207. Hearing and weight. Yes. Do you have that card?

A (Through Interpreter) No.

Q208. What did you do with the cards?

A Honestly, it just got lost. I can't - I don't know. I tried to find it, but I don't know where it is.

Decision of the Minister's delegate

- 26 On 9 March 2017, the Minister's delegate refused to grant the temporary protection visas to the appellants. The delegate made numerous adverse credibility findings against the first appellant. The delegate was not satisfied that the first appellant is an undocumented stateless Faili Kurd in Iran, finding that the first appellant's evidence was inconsistent, implausible and uncorroborated by country of origin information (p 11). The delegate did not accept that the first appellant did not obtain a death certificate for his mother or father in Iran and found it implausible that the first appellant would lose or ruin the only identity documents in his possession, being documents concerning his marriage and the birth of his two children (p 12). The delegate found that the first appellant is a citizen of Iran and that his family members travelled on the first appellant's Iranian passport. As a result, the delegate did not accept that the first appellant does not have any identity documents and found that the first appellant had withheld identity documents for the purpose of strengthening his statelessness claim (p 13).
- 27 The delegate refused the application for a protection visa for two reasons. First, the delegate concluded that s 91W(2) applied because the first appellant had refused or failed to comply with a request under s 91W(1) and had not provided a reasonable explanation for refusing or failing to comply with the request. Second, the delegate concluded that the first appellant was not a person in respect of whom Australia has protection obligations as outlined in s 36(2)(a) or s 36(2)(aa) of the Act (p 3).

Decision of the Authority

28 The delegate's decision was referred to the Authority on 16 March 2017 for review under Part 7AA of the Act. On 17 March 2017, the Authority sent the appellants a letter explaining the Authority's procedures and informing the first appellant that he could make a submission to the Authority in connection with its review.

29 On 31 March 2017, the first appellant provided a written submission to the Authority. At that time, the first appellant did not have representation. The submission complained that the delegate had failed to afford procedural fairness, but the basis for the complaint was largely the first appellant's disagreement with the delegate's findings. The submission made express reference to page 12 of the delegate's decision concerning, amongst other things, the first appellant's failure to produce documents concerning his marriage and the birth of his two children. The first appellant complained that adverse information, which he described as highly specific and not general country information, regarding death, birth and marriage certificates had not been put to him for response. However, the first appellant did not otherwise respond to the delegate's findings on those matters.

30 On 11 August 2017, the Authority made a decision affirming the delegate's decision to refuse to grant temporary protection visas to the appellants. The Authority's decision was based on s 91W and the first appellant's failure to produce documentary evidence of his identity, nationality or citizenship. The Authority found that the first appellant did not have a reasonable explanation for the failure (at [32]). The Authority found that the explanation provided by the first appellant lacked credibility. The relevant findings of the Authority were as follows:

30 The applicant's explanation for his failure to comply with the request is that because he is a stateless, undocumented Faili Kurd refugee, he has no identity documents. However, even if it were the case that the applicant is a stateless and undocumented Faili Kurd refugee, I am not satisfied that this provides a reasonable explanation for his failure to provide the requested identity documents. At the TPV interview the applicant was questioned about what identity documents he and other family members possessed. He said that he and his wife had a piece of paper certifying that they had been married in a religious ceremony. He said that he no longer had this piece of paper because it had been damaged: it was just a normal piece of paper. He said that his children were born in hospital but did not receive birth certificates, only pieces of paper stating their birth weight and results of post-natal tests. He said that these documents have been lost.

31 Even if the applicant were stateless and undocumented, I consider it highly unlikely that he would not have been able to provide any documents of any

kind to confirm any aspect of his account of his life, or of his or his family members' identity. In particular, like the delegate, I do not believe that a stateless, undocumented person would have lost the few official documents which he does claim to have possessed - his children's birth registrations, and the document certifying his religious marriage to his wife. I note that country information confirms that undocumented refugees cannot register a marriage, but states that a religious marriage certificate would provide some protection against an allegation that a couple was in an adulterous marriage. In the light of this information, and given the applicant's claims about his vulnerable position as a stateless undocumented Faili Kurd, I consider it highly unlikely that he would have allowed the certificate showing that he and his wife had undertaken a religious marriage to be damaged to such an extent that he no longer has it. Advice from DFAT indicates that all children born in Iran in hospital should receive an official birth record which would normally, though not necessarily, include details of the parents, although "significant variation" is possible. This "birth record" appears to be the same document referred to by DFAT as an "unofficial hospital record", which is available for children of parents without an official marriage certificate and citizenship. I find it highly implausible that these documents - representing the only official record of his children's dates and places of birth - would simply have been lost, as the applicant claims. Based on the country information, I also have considerable doubt about the applicant's claim that the documents did not contain details of the children's parents, but only information about their birth date and the results of post natal tests. I also find it implausible that the applicant has not been able to provide any documents at all in relation to his brother's situation, or that of his wife's family members; or indeed, in relation to any aspect of his existence in Iran. I consider implausible the applicant's evidence that after having been in regular contact with his brother for many years, he would have lost contact with him only over the twelve months prior to the TPV interview. Overall, I am not satisfied that the applicant has been truthful about what documentation he possessed in Iran, or why he is unable to provide it. I am satisfied that the applicant's certificate of religious marriage and his children's hospital registration records would constitute documentary evidence of the applicant's identity. In all the circumstances, I am not satisfied that the applicant has provided a reasonable explanation for failing to provide the documentary evidence of his identity requested pursuant to s.91W(1).

Decision of the Federal Circuit Court

- 31 On 31 August 2017, the appellants filed an application in the Federal Circuit Court seeking judicial review of the Tribunal's decision under s 476 of the Act. An amended application was filed on 28 February 2022. As noted earlier, the grounds of appeal are materially the same as the grounds of review raised before the Federal Circuit Court (with ground 3(a) being addressed in supplementary submissions received by the primary judge after the hearing).
- 32 Subject to various exceptions (which are not presently applicable), s 476 grants the Federal Circuit Court the same original jurisdiction in relation to migration decisions as the High

Court has under s 75(v) of the *Constitution*. As such, review by the Federal Circuit Court was confined to jurisdictional error: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

33 It is convenient to refer to the conclusions of the primary judge in connection with each of the grounds of appeal.

Appeal ground 3

34 The parties addressed appeal ground 3 first. We will do likewise.

35 By appeal ground 3(a), the appellants contend that ss 91W(2) and (3) would not be engaged in circumstances where the Minister seeks production of a category of documents and the applicant has a reasonable explanation for failing to produce one or more documents within that category, but does not have a reasonable explanation for failing to produce another document within that category. In the present case, the appellants contend that the first appellant had a reasonable explanation for not producing official citizenship papers, and that circumstance was sufficient to discharge s 91W(2) despite the failure to produce marriage and birth documents.

36 The contention finds no support in the statutory text. Section 91W(1) empowers the Minister (or an officer) to request an applicant for a protection visa to produce documentary evidence of the applicant's identity, nationality or citizenship. Section 91W(2) requires the Minister to refuse to grant the protection visa if, amongst other things, the applicant fails to comply with the request without a reasonable explanation. The assessment of whether the applicant has failed to comply with the request, and whether the applicant has done so without a reasonable explanation, is defined by the scope of the request. If the request is for production of a single document, the explanation will necessarily focus on that single document. However, if (as in the present case) the request is for production of a category of documents, the explanation must apply to the category. In the course of argument, Counsel for the appellants appeared to concede as much, whilst maintaining the primary contention advanced on behalf of the appellants. We consider the contention to be untenable.

37 Underlying the appellants' contention appeared to be a concern that s 91W(2) might otherwise apply in circumstances where an applicant is unable to provide an explanation for not being able to produce an obscure document. We do not share the appellants' concern. The reasonableness of any failure to produce a particular document must be assessed having

regard to the type of document in question and the objective likelihood of the applicant possessing the document at some point in time. Further, the concern has no relevance to the facts of the present case. In the present case, the first appellant was asked about a range of documents that might have proved his identity, including documents relating to his parents, identity documents issued by the Iranian government to the first or second appellant, and documents concerning the marriage of the first and second appellants and the birth of the third and fourth appellants. Section 91W(2) required the Minister's delegate, and the Authority on review, to assess whether the first appellant's explanation for the failure to produce *any* such documents was reasonable. It is clear from the Authority's decision that it assessed the totality of the first appellant's explanation, but found that the explanation lacked credibility. The Authority concluded that the first appellant had not been truthful about what documentation he possessed in Iran and why he is unable to produce it (at [31]). That conclusion did not involve any misconstruction of s 91W(2). The appellants did not contend that the Authority's conclusion in that regard was legally unreasonable.

38 The reasoning of the primary judge was to the same effect. Respectfully, we agree with the following observations of her Honour (at [80]):

Precisely what amounts to a reasonable explanation and what documents an applicant might reasonably have been expected to produce will necessarily turn on the specific facts of the case being considered. In the present case, the approach of the Authority was to focus on the documents that the first applicant claimed to have once been in possession of, and to consider whether he had a reasonable explanation for not producing those documents. There is no error in this approach.

39 For the foregoing reasons, we reject appeal ground 3(a).

40 By appeal ground 3(b), the appellants contend that the Authority failed to consider the first appellant's claim in his statutory declaration of 3 November 2016 to have unsuccessfully attempted to obtain Iranian documentation in respect of his identity. The appellants advanced this contention as a corollary to appeal ground 3(a), arguing that the first appellant's claim was sufficient to satisfy s 91W(3). In so far as the contention was advanced as a corollary to ground 3(a), it must fail for the reason that we reject ground 3(a). However, we record for completeness that we reject the premise of ground 3(b) in any event.

41 In its reasons, the Authority referred to both of the statutory declarations that had been made by the first appellant. The appellants acknowledged that the Authority referenced the statutory declaration of 3 November 2016 at para 9 of its reasons, which was as follows:

The applicant claims that his family were undocumented, unregistered refugees. Although his evidence has been inconsistent, he essentially claims that his father never had a green card, he himself has never possessed a green or a white card and is an unregistered refugee with no rights or entitlements. He claims that in about 2002 he applied for both citizenship and a white card, but was unsuccessful because he could not prove Iranian ancestry. The applicant claims that he and his family left Iran on one passport, in which they were all included, which was fraudulently issued to them by the people smuggler.

42 It was common ground that the reference to 2002 in that paragraph was a typographical error which should have been 2005.

43 The appellants submitted that, whilst the Authority referenced the statutory declaration of 3 November 2016 at para 9, it did not refer to it in the section of its reasons in which it considered the application of s 91W to the facts of this case. The appellants submitted that a fair reading of the Authority's reasons is that it failed to take into account the first appellant's explanation about not possessing citizenship papers when the Authority decided that s 91W(3) was not engaged.

44 We reject that submission. It requires the Authority's reasons to be read in a disembodied manner. It is clear that the Authority took into account the first appellant's explanation, given in his statutory declaration of 3 November 2016, of his unsuccessful attempt to obtain Iranian identity documentation. That evidence was recited at para 9 of the Authority's reasons. It was not necessary for the Authority to repeat the evidence in the course of its reasoning. The Authority reached the conclusion that the first appellant had not been truthful overall about what documents he possessed in Iran based on a range of facts referred to in para 31. It is apparent that the evidence given by the first appellant in his statutory declaration of 3 November 2016 did not weigh in favour of the Authority's conclusion, and therefore the Authority did not refer to it in that context, but that does not mean that the Authority failed to consider it. As the primary judge correctly observed (at [86]):

... the failure to specifically refer to the November 2016 statutory declaration in its reasons at [30] and [31] more accurately reflects an assessment that the content of that statutory declaration was not material to its findings in those paragraphs: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184 at [46]-[47].

45 For the foregoing reasons, we reject appeal ground 3(b).

Appeal ground 1

46 Appeal ground 1 focuses upon that part of the Authority's reasons which concern the first and second appellants' failure to retain a documentary record of their marriage. At para 31 (reproduced above), the Authority said:

I note that country information confirms that undocumented refugees cannot register a marriage, but states that a religious marriage certificate would provide some protection against an allegation that a couple was in an adulterous marriage. In the light of this information, and given the applicant's claims about his vulnerable position as a stateless undocumented Faili Kurd, I consider it highly unlikely that he would have allowed the certificate showing that he and his wife had undertaken a religious marriage to be damaged to such an extent that he no longer has it.

47 The first sentence has a footnote reference to the following document: Faili Kurds Briefing Paper Issued by the Country Advice section of the Independent Protection Assessment Office in May 2012 (**IPAO Briefing Paper**) at page 28. The IPAO Briefing Paper stated that UNHCR advised DFAT Post in Tehran in April 2011:

Registered Faili Kurds are able to record their marriages, including on their Amayesh card, which shows them as a member of a household. Unregistered Faili Kurds could enter into religious marriages, but without registering as refugees with Iranian authorities they would not be able to record the marriage officially. There is a risk of prosecution for any unmarried couple who cohabit or have children. This risk would be greater in rural and provincial areas, than it is in Tehran. Stoning is a possible penalty for adultery, but it is rarely carried out. A religious marriage certificate may provide a 'defence' to such prosecution, although it would depend on the terms of the marriage (temporary marriage is permitted in Iran, and a religious marriage certificate could be expired). We note that a registered Faili Kurd woman could lose her refugee registration and associated rights if she officially recorded her marriage to an unregistered refugee. For this reason, some registered women avoid officially recording their marriage

48 The gravamen of the appellants' complaint is that the Authority based its reasoning on the foregoing country information without putting that information to the first and/or second appellants and seeking a response. The appellants submitted that, at least in part, the Authority disbelieved the first appellant's explanation for failing to retain the document recording his marriage because the country information indicated that a religious marriage certificate would provide some protection against an allegation that a couple was in an adulterous relationship.

49 The appellants submitted that they were not on notice that the Authority might reason in that manner, and therefore did not advance submissions prior to the decision on that issue. The appellants submitted that although the first appellant was asked questions about the marriage document in his interview with the delegate, the questions did not clearly raise this issue.

Those questions and answers were reproduced above. Although question 197 was “So how do you prove that you are married?”, the appellants submitted that the risk of being accused of being in an adulterous relationship was not squarely raised. The appellants further submitted that this issue was not raised in the delegate’s reasons. The delegate merely stated that:

In relation to the applicant’s other documents, I consider implausible that the applicant would lose or ruin the only identity documents in his possession. Therefore, I do not accept that the applicant has no evidence of his marriage and two children’s births.

50 The appellants contend that the Authority’s decision is affected by jurisdictional error because the Authority unreasonably failed to exercise the power in s 473DC of the Act to get new information from the appellants in respect of how the first and second appellants would have responded to a hypothetical allegation of adultery.

51 Ordinarily, a complaint that an administrative decision-maker failed to identify a material issue and seek a response from the person affected raises a question of procedural fairness: see for example *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-592 (Northrop, Miles and French JJ); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 22 CLR 152 at [32]-[36] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). However, the rules of procedural fairness are curtailed in a review conducted by the Authority under Part 7AA of the Act. For that reason, the appellants framed their complaint as an unreasonable failure by the Authority to seek information pursuant to s 473DC of the Act. The power in s 473DC is an exception to the general requirement, stated in s 473DB, that the Authority conduct its review “on the papers” and without accepting or requesting new information and without interviewing the applicant. Section 473DC(1) provides that the Authority may get any documents or information that were not before the Minister when the Minister made the decision under review and which the Authority considers relevant. Section 473DC(2) stipulates that the Authority does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by the applicant or in any other circumstances.

52 It is uncontroversial that the Authority’s power in s 473DC must be exercised within the bounds of legal reasonableness: *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [15] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at [27] (Kiefel CJ, Bell, Keane, Gordon and

Edelman JJ). Nevertheless, the assessment of legal reasonableness must be undertaken by reference to the statutory framework in which the decision is being made. Demonstrating legal unreasonableness in the context of the discretionary power under s 473DC involves a “demanding standard”: *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [110] (Beach, O’Callaghan and Anastassiou JJ).

53 In the present case, we are not persuaded that it was legally unreasonable for the Authority to place reliance upon what was said in the IPAO Briefing Paper, that a religious marriage certificate would provide some protection against an allegation of adultery, without seeking a response from the first and second appellants. By virtue of s 57 of the Act, the Minister’s delegate had no obligation as a matter of procedural fairness to provide the IPAO Briefing Paper to the appellants (as the relevant information in the Briefing Paper was generic country information). The IPAO Briefing Paper was referred to in the delegate’s decision (at footnotes 4 and 5), with the result that the Authority was also not required to provide the IPAO Briefing Paper to the appellants (see s 473DA(2)). We respectfully agree with the reasoning of the primary judge that:

- (a) the first appellant was on notice that whether he had a reasonable explanation for not providing his religious marriage certificate was an issue to be determined (at [35]-[36], [39]);
- (b) at his protection visa application interview, the first appellant was specifically asked to explain how he would prove his marriage and, in response, he referred to the religious marriage certificate (at [41]); and
- (c) there was nothing in the delegate’s decision that could have caused the first appellant to believe that, before the Authority, this issue was likely to be resolved in his favour (at [40]).

54 The relevant question is whether the Authority’s failure to exercise the discretionary power under s 473DC to seek a response from the appellants to the statements in the IPAO Briefing Paper lacked an evident and intelligible basis having regard to the circumstances. We do not consider that it did. The Authority’s principal finding was that it is highly unlikely that the first appellant would not have been able to provide any documents of any kind to confirm any aspect of his account of his life, or of his or his family members’ identity, and the Authority did not believe that the first appellant would have lost the few official documents which he claims to have possessed – his children’s birth registrations and the document certifying his

religious marriage to his wife (at [31]). As submitted by the Minister, the IPAO Briefing Paper emphasised the importance of a religious marriage certificate as an identity document for the appellants and the unlikelihood of their having lost that document. As such, it did no more than bolster the Authority's overall lack of satisfaction with the explanation given by the first appellant for not producing any documents of any kind to confirm any aspect of his account of his life and his identity.

55 For the foregoing reasons, we reject appeal ground 1.

Appeal ground 2

56 Appeal ground 2 concerns the Authority's findings with respect to the first appellant's explanation for not producing any documents recording the birth of his first and second child in Iran. The ground is directed to the following passage from para 31 of the Authority's reasons:

Advice from DFAT indicates that all children born in Iran in hospital should receive an official birth record which would normally, though not necessarily, include details of the parents, although "significant variation" is possible. This "birth record" appears to be the same document referred to by DFAT as an "unofficial hospital record", which is available for children of parents without an official marriage certificate and citizenship. I find it highly implausible that these documents - representing the only official record of his children's dates and places of birth - would simply have been lost, as the applicant claims. Based on the country information, I also have considerable doubt about the applicant's claim that the documents did not contain details of the children's parents, but only information about their birth date and the results of post natal tests.

57 The appellants contend that it was not open on the evidence for the Authority to find that the hospital cards given to the first (and/or second) appellant in respect of the birth of their first and second child were the "only official record" of their birth because the hospital cards were not "official records". As such, the appellants contend that the reasoning is illogical or irrational and thereby legally unreasonable, referring to *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135] (Crennan and Bell JJ).

58 The appellants submitted that the Authority's findings were based on a misreading or misunderstanding of the DFAT advice to which the Authority referred, being the DFAT Thematic Report Faili Kurds in Iraq and Iran dated 3 December 2014 at [3.40]-[3.41]. Those paragraphs appeared in a section of the DFAT advice concerning documentation available to Faili Kurds in Iran (and Iraq). Under the heading "Birth Certificates", the DFAT advice recorded the following:

- 3.40 All children born in hospital in Iran should receive an official birth record. This would normally state the date, time, place and the parents' details. However, significant variation is possible. This does not automatically establish any citizenship rights for the child.
- 3.41 An official marriage certificate - not a religious document - and Iranian citizenship are required to register the birth of a child and receive an Iranian birth certificate. A birth certificate would not be issued with only the father's name recorded, unless the mother was deceased and a death certificate presented. An unofficial hospital certificate recording the birth is usually provided in other cases.

59 The appellants submitted that, in its reasons, the Authority stated that the birth record referred to in [3.40] is the same document as the hospital certificate referred to in [3.41]. The appellants argued that that cannot be correct because the former is referred to as an "official birth record" while the latter is referred to as an "unofficial hospital certificate". The appellants argued that the evidence of the first appellant was that he received an unofficial document from the hospital, and the Authority was wrong to describe that document as "the only official record of his children's dates and places of birth".

60 We reject both aspects of the appellants' argument: that the Authority interpreted the DFAT advice at [3.40]-[3.41] in an illogical or irrational manner; and that the Authority's description of the hospital record as "official" was illogical or irrational.

61 As to the first aspect, we respectfully agree with the primary judge's observation that the DFAT advice at [3.40]-[3.41] is open to a number of interpretations (at [54]). The advice is not stated in a clear manner. It is possible, as the primary judge observed, that the "official birth record" referred to at [3.40] is the same document as the "unofficial birth certificate" referred to at [3.41], notwithstanding the inconsistent use of the designations "official" and "unofficial". We also agree with the Minister's submission that the assessment of country information was a matter for the Authority in the performance of its fact-finding function: *CPQ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 191 at [24] (Rares, Thomas and Banks-Smith JJ); *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [10]-[14] (Gray, Tamberlin and Lander JJ). We consider that it was open to the Authority to interpret the DFAT advice at [3.40]-[3.41] as stating that, where parents of children born in Iran are unable to obtain an Iranian birth certificate, they would (in most cases) at least receive a record of the birth from the hospital. That interpretation of the DFAT advice cannot be described as illogical or irrational.

62 As to the second aspect, we also respectfully agree with the primary judge’s conclusion that, where the Authority referred to the documents from the hospital that the applicants previously held as the “only official record” of the children’s dates and places of birth, it was using the term “official” to describe documents given by a reputable or authoritative source (at [55]). Reading the Authority’s reasons fairly and the relevant statements in context, that is the meaning being conveyed by the Authority. The Authority found it implausible that the first appellant would not have retained the only record that existed of the birth of his first and second child. The use of the word “official” in that context is best understood as referencing the fact that the record came from the hospital in which the children were born. It is neither strained nor artificial to describe such a document as “official”, in circumstances where the first appellant claims not to possess any documents establishing the identity of himself or his family. The Authority’s reasoning and conclusion cannot be described as illogical or irrational.

63 For the foregoing reasons, we reject appeal ground 2.

Conclusion

64 The grounds of appeal do not identify jurisdictional error on the part of the Authority, nor any error on the part of the primary judge. The appeal should be dismissed with costs.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Beach, Wheelahan and O’Bryan.

Associate:

Dated: 21 March 2024

SCHEDULE OF PARTIES

VID 221 of 2023

Appellants

Fourth Appellant: DXL17 BY HER LITIGATION GUARDIAN DXG17

Fifth Appellant: DXM17 BY HIS LITIGATION GUARDIAN DXG17